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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 785.

NATIONAL GARMENT COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO BOARD'S BRIEF RE WRIT OF CERTIORARI.

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PETITIONER'S REPLY TO BOARD'S BRIEF RE WRIT OF CERTIORARI.

I.

The Board Obfuscates the Issues.

Questions presented by us are set out on pages 4 and 5 of our Petition. In the Board's Brief, on page 3, its recital of "Questions Presented" is not the same. The Board has attempted to skirt the issues, and as it will be seen, it ignores some in part and others in whole. We find no reference at all in its Brief to our question[1] numbered 2 and only an oblique reference to our question[2] numbered 4.

On page 16 of the Board's Brief we read, ". . . the question which Petitioner seeks to raise (Petition, 17-18) concerning the effect of the general savings statute . . . upon amending legislation is not presented," and then the Board proceeds, "In any event, as the Court below held, it is well settled by decisions of this Court that the general savings statute operates to preserve liabilities which accrue prior to amendment, as well as prior to repeal of Federal statutes (Great Northern Railway Co. v. U. S., 208 U. S. 452, 464-469)."

We have before us the case of **Great Northern Railway Co. v. U. S.**, cited by the Board, and read on page 464 that, "it is insisted by the Railway Company that the Elkins

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1 "2. Whether a Board's order [which, under Sec. 10 (e) of the Act (before or after amendments) could be enforced, modified, or enforced as modified, or set aside in whole or in part by the Court] is of such a final nature that the Board may not be required to conform to new standards for Board action contained in remedial legislation in effect after rendition of the Board's order and before an enforcement decree is entered?"

2 "4. Whether the General Savings Statute (16 Statutes 431, 1 U. S. C. 29) pertaining to effect of **repealing** legislation has any bearing on construction of **amendments** to the National Labor Relations Act so as to prevent a reviewing court from applying an amendment to the Act, Sec. 10 (c), with reference to back pay orders, or new standards set out in amended Act controlling Board and Court action?"

Act was amended and re-enacted by Section 2 of the Hepburn Act, and that thereby a **repeal** of the Elkins Act was accomplished . . ." On the same page the Court stated:

> ". . . we concede for the sake of argument only that the effect of the amendment and re-enactment of the Elkins Act by Section 2 of the Hepburn Law was to repeal the Elkins Act, and in the light **of this concession,** we propose to determine whether the right to prosecute . . . was lost by reason of the adoption of that law." (Emphasis ours.)

The Court then applied Section 13 of the Revised Statutes (the "general savings statute") to the situation in which the Railway Company contended that a repeal was accomplished.

The Board cited on page 17 of its Brief a number of cases from appellate courts. Only one is in point. There is nothing to show the precise question up for determination before this Court was urged by the Respondent therein. (**N. L. R. B. v. Mylan Sparta Co.,** 166 Fed. [2d] 485, 488 [Sixth Circuit].) The Board also cites on page 17, **N. L. R. B. v. Sandy Hill Iron and Brass Works,** 165 Fed. (2d) 660 (Second Circuit). It will be seen (p. 662) that the Court **refused to consider the issue.** In two other cases, **N. L. R. B. v. Broven,** 166 Fed. (2d) 812 (Second Circuit), and **N. L. R. B. v. Gates City Cotton Mills** (April 16, 1948), L. R. R. M. 2965 (Fifth Circuit), the Courts **do not even mention the issue.** Finally, the Board cites **Edward G. Budd Mfg. Co. v. N. L. R. B.,** 332 U. S. 840, wherein this Court in sending a case back for review failed to grant certiorari on the question of the effect of the "general savings statute." Certainly, no inferences can be drawn from the Court's action in that matter which gave other relief to the Petitioner. It would be well for the Board to remember the statement to be found in **House v. Mayo,** 324 U. S. 42, 48, 89 Law Ed. 739, 743,

". . . but as we have often said, a denial of the certiorari by this Court imports no expression of opinion upon the merits of a case."

II.

The Court Below Did Not Apply the Standards of the Act as Amended.

The Board contends (p. 13) our assertion is without merit that the Court below applied the standards of review contained in the initial Act, rather than the Act as amended. It endeavors to dilute the force of the Court's statement which reads:

> "Our refusal to remand the case to the Board to take additional evidence was in the exercise of discretion **and the Board's petition for enforcement is ruled on in this opinion** as of the date of issuance of the order." 166 Fed. (2d) 233, 238. (Emphasis ours.)

by claiming, "the statement was directed only, however, to Petitioner's contention below . . . that the change in ownership of the Wellsville plant . . . rendered the case moot and compliance with the Board's order impossible." The quoted portion of the opinion is not susceptible to such laborious distortion. In the same paragraph from which the excerpt is taken, the court states that the **contentions** with reference to changes in ownership rendering the case moot and compliance with the order impossible **"are not considered in this opinion."** (Emphasis ours.)

But irrespective of what the Board interprets the Court to have meant, **the fact remains** the Court did not follow the standards for judicial review in effect at the time the case was submitted and ruled on. It did not hold that the findings of the Board were **"supported by substantial evidence on the record considered as a whole,"** as required

under Sec. 10 (e) of the Act then in force. In one place it refers to certain findings of the Board ". . . are supported by substantial evidence" (L. C. 238 under points 7, 8) and in another place (on page 239 under points 9, 10) the court merely stated, ". . . as to the employee, Abbie Ruth Cobb, we find the order of the Board is sustained by the evidence." We submit that such findings do not conform to the requirements of the Act as amended, nor to Congressional intent as expressed in the House Conference Report No. 510 (Appendix to Petition, p. 30).

The Court, when it acted on the Board's order had to meet the standards in the law **then** applicable for the Court's action. Those new standards, as pointed out by House Conference Report 510 (see pp. 10, 11 of our Brief) applied to Board findings as well as Court findings. If the Board's findings did not meet the prerequisites of the Act then in force, irrespective of the reason, the Court could not enforce the order. A Court's determination in such a situation would not be applying the Act retroactively, but giving it effect **then and there** as it stood.[3]

But surely, the Board in talking about prospective and retrospective effects of the Act as amended does not mean to exclude its force from pending suits.

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3 "The rule was thus stated in Farrell v. State, 54 N. J. Law 421, 24 A. 725: 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. Parsons v. Circuit Judge, 37 Mich. 287. In Conrad v. Nail, 24 Mich. 275, a section in the chapter of the Code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter, in its present form, must be read as one act. The rule is correctly stated in Endlich on Statutes, Sec. 294, as follows: "A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments eliminated."'"

The above is quoted from **Blair v. Chicago,** 201 U. S. 400, 475, 26 S. Ct. 427, 446, 50 L. Ed. 801. When the court below, in our case, acted on review its acts **were subsequent** to the amendments and it could not ignore the law as amended then in force.

The requisites for Board and Court action apply to pending as well as future suits.[4] Congress clearly meant them to be. The savings clauses of the Act made no exception. The House Conference Report 510 (supra) is lucid. In **N. L. R. B. v. Wyandotte Transportation Co.**, 166 F. (2d) 434 (6th Circuit), not previously cited by us, we have another case of a Court recognizing the force of the law in a pending suit.[5]

III

This Court has not reversed the Carlisle Lumber case nor passed on the pertinent amendment with reference to back pay.

We note the Board concedes there is a conflict of authority as to whether back pay may be awarded in a case where employees have been reinstated prior to a Board hearing, and no order of reinstatement is involved. The amendment made by Congress to Sec. 10 (c) reads:

> "**Provided, That where an order directs reinstatement of an employee,** back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:"

We are advised by the Board (p. 16) that the language of the proviso was "to permit the Board to assess labor organizations as well as employers for back pay." **Can labor organizations be assessed back pay, where there is no order of reinstatement?** The language permits no such construction. It likewise does not call for a different construction to the prejudice of management. This issue before the Court involves a question of substance.

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4 See Bowles v. Strickland, 151 F. (2d) 419, 420; In re Jacobs, 31 F. Supp. 620, 622.

5 In our Brief, p. 14, we discern an error in citation of Eastern Gas & Fuel Assn. v. N. L. R. B. (6th Circuit). The correct citation is 162 F. (2d) 864, 866.

IN CONCLUSION.

Our reply is, of necessity, brief. There is much more that we could amplify. But we believe the Court can at this stage without further need for suggestions determine the merits of the petition.

Respectfully submitted,

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June 9, 1948.